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No. 88-884

In The

Supreme Court of the United States

October Term, 1988

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Petitioners' Statement of the Case incorrectly denominates as "fact findings" certain items which are properly characterized as conclusions of law resulting from the application of legal principles and analysis to underlying

facts. Solely for the purposes of this Brief, Respondent accepts as true the remainder of Petitioners' Statement of the Case.

ARGUMENT

Rule 52(a) was Properly Applied in This Case

Petitioners' complaint about the Fifth Circuit's review is without merit. The reversal of the district court resulted from a disagreement with the ultimate determination, i.e., that Respondents are "governmental bodies" under the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1989) (the "Texas Act"). The Fifth Circuit has *plenary* power to review that holding and is not restricted to the "clearly erroneous" standard of Rule 52(a).

The Fifth Circuit did *not* disagree with the district court's findings of the subsidiary, historical facts that formed the basis of the court's ultimate conclusion. The only "facts" necessary to determine whether Respondents are subject to the Texas Act were (i) the source and amount of funds paid to Respondents, and (ii) the services provided by Respondents in return for such funds. The court of appeals thoroughly reviewed the fact findings on these points under the appropriate standard.

Petitioners improperly characterize as "fact findings" the legal determinations of whether Respondents (i) "provide measurable services in return for a certain amount of money," and (ii) "are supported in part by public funds of the State of Texas." (Petition at 5-6) These rulings

are actually "conclusions" resulting from the application of legal tests and factors to the above-mentioned "facts." *See Kneeland v. NCAA*, 850 F.2d 224, 228-31 (5th Cir. 1988) (applying Texas Attorney General's "patterns of analysis to the facts at bar").

Courts of appeals are *not* bound by the limits of Rule 52(a) "when making an independent determination as to the legal conclusions and inferences which should be drawn from [findings of fact]." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984); *United States v. Grayson County State Bank*, 656 F.2d 1070, 1075 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982). "It is axiomatic that the scope of review of the legal effect given to accepted facts is much broader than the clearly erroneous standard." *Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 590 (5th Cir. 1980).

The propriety of the Fifth Circuit's review in this case is demonstrated by the analogous review in *United States v. Winthrop*, 417 F.2d 905 (5th Cir. 1969). The sole issue in *Winthrop* was whether profits from the sale of subdivided real estate constituted capital gains or ordinary income for income tax purposes. *Id.* at 906. The Fifth Circuit conducted an ad hoc review of the underlying facts and held that the district court had improperly concluded that the taxpayer's profits constituted ordinary income. In discussing the scope of its review, the court recognized that "even though we accept as true the fact findings of the court below, it is nevertheless incumbent upon this court to inquire into the ultimate conclusion

of law reached by that court." *Id.* at 910. To that end, the court noted that

> the district court's finding on this ultimate issue, however, is not to be garrisoned by the clearly erroneous rule. Though it has factual underpinnings this ultimate issue is inherently a question of law. Obeisance to the clearly erroneous rule must yield when the facts are undisputed and we are called upon to reason and interpret. This is the law obligation of the court as distinguished from its fact finding duties.

Id. See Radio WHKW, Inc. v. Yarber, 838 F.2d 1439, 1442 (5th Cir. 1988); *Armstead v. Maggio*, 720 F.2d 894, 896 (5th Cir. 1983); *American Nat'l Bank v. United States*, 421 F.2d 442, 450-51 (5th Cir.), *cert. denied*, 400 U.S. 819 (1970).

The district court's rulings in the case at bar with which the court of appeals disagreed were conclusions derived from legal analysis of essentially undisputed facts. The court of appeals simply subjected the district court's analysis to plenary review to ensure that that court's understanding and application of the law was proper. The Fifth Circuit's review was correct. It was conducted pursuant to the proper standard.

The Court of Appeals Correctly Reviewed and Applied Texas Law

Petitioners' claim that the court of appeals incorrectly applied Texas Attorney General opinions to the facts of this case, thereby violating 28 U.S.C. § 1652, is inherently flawed. That statute simply requires federal courts to regard "[t]he laws of the several states . . . as rules of decision . . . in cases where they apply." 28 U.S.C.

§ 1652. The attorney general opinions at issue, however, are *not* "controlling substantive state law" or "dispositive Texas jurisprudence" as argued by Petitioners. (Petition at 9-10) *See Shore v. Howard,* 414 F. Supp. 379, 390 (N.D. Tex. 1976) (Texas Attorney General opinions are persuasive, but "do not carry the decisive weight of caselaw"). Even the district court in this case recognized that these "opinions" are not conclusive authority. *Kneeland v. NCAA,* 650 F. Supp. 1047, 1056 n.3 (W.D. Tex. 1986), (citing *City of Houston v. Houston Chronicle Publishing Co.,* 673 S.W.2d 316 (Tex. Civ. App.—Houston [1st Dist.] 1984, no writ); *Smith v. McCoy,* 533 S.W.2d 457 (Tex. Civ. App.—Dallas 1976, writ dism'd)), *rev'd,* 850 F.2d 224 (5th Cir. 1988).

The Fifth Circuit "closely examined" the attorney general opinions and sought guidance from them. *Kneeland,* 850 F.2d at 228. The court, however, was not bound by the opinions and was free to interpret or reject the opinions as it would any other nonconclusive authority. As the court of appeals noted (in a passage from which Petitioners conveniently quoted only favorable language), "[w]e find helpful signs, albeit mixed signals, in the opinions which generally are fact-specific." *Id.* The nature of reliance placed upon the opinions is further evidenced by the Fifth Circuit's notations that the opinions merely "advise" and "inform"—the opinions are *not* binding, controlling, or dispositive. *Id. See Tahoe Regional Planning Agency v. McKay,* 769 F.2d 534, 539 (9th Cir. 1985) (Nevada Attorney General opinions are not binding); *Mogis v. Lyman-Richey Sand & Gravel Corp.,* 189 F.2d 130, 139-40 (8th Cir.) (Nebraska Attorney General opinion is neither legal precedent nor judicial decision, and "has

no controlling authority upon the state of the law discussed in it"), *cert. denied*, 342 U.S. 877 (1951).

There is no need to dissect the attorney general opinions reviewed by the court of appeals. The opinions were relied upon by the court to the extent it deemed necessary for guidance. Petitioners may disagree with the court's decision, but their complaint as to how the court reached that decision is without merit.

CONCLUSION

For the foregoing reasons, the writ of certiorari should not issue in this action.

Respectfully submitted,

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